Commission v. Poland – A Stepping Stone Towards a Strong "Union of Values"?

Luke Dimitrios Spieker 2019-05-30T09:00:51

Commission v. Poland marks a showdown in the EU's current "value crisis". Its possible results, however, seem rather predictable: With Advocate General Tanchev's recent opinion and the Court's orders rendered in the case, it appears very likely that the CJEU will find Poland in breach of Article 19(1)(2) TEU. Further, the Court seems to have already prepared the legal grounds for adjudicating the case in its seminal *ASJP*-judgment.

Yet, the latter is still surrounded by several uncertainties. In this decision, the Court interpreted Article 19(1)(2) TEU as establishing an obligation of judicial independence for *every* Member State court that has the *abstract* power to apply EU law – even if it does not *actually* apply it in the specific case at hand. Thus, Article 19(1)(2) TEU reaches de facto *every* Member State court. Two points seem particularly difficult to grasp: First, the Court did not elaborate on the complex relationship of Article 19(1)(2) TEU and Article 47 of the Charter. And second, it is not entirely clear how it justified the immense scope it has accorded to Article 19(1)(2) TEU. The CJEU's reasoning seems to oscillate between well-known *effet utile* considerations and a new, ground-breaking rationale – the judicial applicability of the Union's common values enshrined in Article 2 TEU.

Commission v. Poland gives the Court not only the opportunity to put *ASJP* into practice but also to clarify the doctrinal framework for finally addressing the developments in "backsliding" Member States under EU law. This contribution will shed some light on these two uncertainties, suggest ways of how the Court could resolve them and explore the potential repercussions for the EU legal order.

I. Extending the Charter through the backdoor of Article 19(1)(2) TEU?

In *ASJP*, the Court relied on Article 19(1)(2) TEU – not Article 47 CFR – in order to address judicial independence in a Member State. Pursuant to Article 19(1)(2) TEU, "Member States shall provide remedies sufficient to ensure effective legal protection in the *fields covered by Union law*", which includes guaranteeing an independent judiciary. Why did the CJEU not rely on the equivalent Article 47 CFR (on this equivalence, see e.g. *Berlioz*, para. 44)? Probably because the case at hand (and by the way also the respective Polish reforms in *Commission v. Poland*) fit uneasily with the scope of the Charter under Article 51(1) CFR. According to the Court in *ASJP*, however, Article 19(1)(2) TEU applies "*irrespective* of whether the

Member States are implementing Union law, within the meaning of Article 51(1) of the Charter". Unfortunately, the exact meaning of this sentence remains obscure: Does it imply that Article 19(1)(2) TEU has a *different* or even a *broader* scope of application than the Charter?[1)]For such an interpretation, see e.g. K. Lenaerts, On Judicial Independence and the Quest for National, Supranational and Transnational Justice, in: G. Selvik et al. (eds.), The Art of Judicial Reasoning (Springer, 2019), 155, 163: "the scope of application of the second subparagraph Article 19(1) TEU is not the same as that of Article 47 of the Charter. The former applies to 'the fields covered by EU law', whilst the latter applies to national measures implementing EU law within the meaning of Article 51(1) of the Charter"; see further the opinion of Advocate General Tanchev: "a *separate* assessment of the material scope of the second subparagraph of Article 19(1) TEU, and of Article 47 of the Charter is required". Instead of further clarifying this position, however, he completed his assessment at the procedural level: The Commission has the burden of proof to establish a violation of EU law (including its applicability in the first place) and failed to put forward any arguments concerning the Charter's application.

1. The "shadow" of Article 19(1)(2) TEU

Prima facie, any difference in scope between Article 19 TEU and the Charter seems odd. As Koen Lenaerts formulated so famously with regard to the scope of the Charter under Article 51(1) CFR:

"Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter."[2)]K. Lenaerts/J.A. Guttièrez-Fons, The Place of the Charter in the EU Constitutional Edifice, in: Steve Peers et al. (eds.), The EU Charter of Fundamental Rights: A Commentary (Hart, 2014), 1559, 1567.

If the Charter follows the scope of Union law (and *ergo* that of Article 19(1)(2) TEU) like a shadow, one would expect the Charter to reach as far as Article 19(1)(2) does.[3)]This point has been advanced by M. Claes/M. Bonelli, Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary, European Constitutional Law Review 14 (2018), 622, 630-631. This view is supported by the Court's stance in *Åkerberg Fransson*: "situations cannot exist which are covered … by European Union law without those fundamental rights being applicable." Admittedly, this position has been subsequently watered down in the Court's case law: The shadow of EU law has begun to develop a certain "penumbra". Yet one situation has remained crystal clear: The Charter applies when EU law creates a "specific obligation" for the Member States (see *Hernández*, para. 35 and *Siragusa*,paras. 26-27).The creation of such "specific obligations" to guarantee an independent judiciary was exactly the reason for the Court's interpretation of Article 19(1)(2) in *ASJP*.

In this sense, Article 19(1)(2) TEU could be understood as defining the scope of Union law within the meaning of Article 51(1) CFR. According to *ASJP*, Article 19(1)(2) TEU creates an obligation of judicial independence for every national court which is abstractly empowered to apply EU law. Letting the Charter and Article 47 CFR

"follow" the scope of Article 19(1)(2) TEU would imply, therefore, that Article 47 (and the Charter as a whole) is applicable in virtually *every* procedure before a Member State court.

2. Far reaching implications

Such an interpretation would entail an enormous extension of the Charter's scope. Before *ASJP*, a lack of effective judicial protection in procedures concerning *solely* national law was deemed insufficient to trigger Article 47 CFR. The subject matter needed to be EU law in the *specific* case at hand (see e.g. *Maurin*, paras. 11-12). After *ASJP*, an individual can in theory rely on Article 47 CFR whenever it is confronted with a judge lacking the necessary degree of independence. This would render the organisation of the whole national judiciary *justiciable for individual actions under EU law*.

Such an extension of the Charter's scope was probably neither the drafters' nor the judges' intention. In a speech held immediately after *ASJP*, Judge von Danwitz emphasised that the recourse to Article 19(1)(2) TEU was meant as a way "to resist the temptation to go beyond the limits of the scope of the Charter as set out in the first paragraph of its Article 51". The only way out of this dilemma seems to be an eventual departure from the Court's clear-cut stance in *Åkerberg Fransson*. The CJEU could draw a line between two dimensions: On one hand, a structural, objective rule of law dimension under Article 19 TEU which is concerned with the EU judicial system as a whole; on the other hand, an individual, subjectivefundamental rights dimension concerned with individual fundamental rights violations under the Charter (and thus Article 47 CFR). Both dimensions would preserve an independent nature, rationale and function justifying a diverging scope.

Yet there are good arguments for the Charter's application in situations covered by Article 19(1)(2) TEU. First, the EU legal order relied from its very beginning on the "vigilance of individuals … to protect their rights". Empowering the individual to enforce Treaty obligations is therefore not alien to EU law. In its recent *L.M.* judgement, the Court seems to have taken a further step into this direction. It allowed for the general possibility to postpone a European Arrest Warrant when judicial independence in the issuing Member State is at stake. According to the Court, an individual can challenge its surrender to such a Member State *based on Article 47 CFR*. This has been interpreted as empowering "individuals for defending European values" (see here). Second, the Court has already begun to increasingly expand the scope of the Charter to situations in which EU law does not concretely apply in the specific case at hand. In a recent line of cases, the CJEU applied the Charter to horizontalsituations between individuals in which EU law (a directive) did not *actually* apply.[4)]Directives do not apply horizontally between two private individuals, see e.g. *Bauer*, paras. 76-77, *Max-Planck-Gesellschaft*, paras. 66-76. For the Charter to be applicable it was sufficient that the "field [was] covered by EU law" (see *Egenberger*, para. 76, *Bauer*, para. 85, *Max-Planck-Gesellschaft*, para. 74 and *Cresco Investigation*, para. 76). Interestingly, this is exactly the same wording we find in Article 19(1)(2) TEU as well.

Eventually, the Court will have to make a decision: Either it will have to further attenuate *Åkerberg Fransson* and accept that there might be many diverging and different scopes in EU law; or it might opt for expanding the Charter's application in national court proceedings. To say it bluntly: Either the Court sacrifices *Åkerberg Fransson* or it puts Article 51(1) CFR at risk. It cannot have it both ways.

II. Explaining the broad scope of application of Article 19(1)(2) TEU

The second major issue of *ASJP* was the massive extension of Article 19(1)(2) TEU's scope. According to the Court's interpretation, Article 19(1)(2) TEU creates obligations for every Member State court which is *potentially* in the situation of applying EU law. This means de facto *every* Member State court. A thorough analysis of *ASJP* reveals two (complementary?) rationales justifying this ample scope reaching far into domestic territory.

1. A recourse to the effet utile …

Prima facie, the Court seems to employ the well-established *effet utile* rationale. First, it refers to the functioning of the preliminary reference procedure under Article 267 TFEU. National courts have an indispensable position in the effective and uniform application of EU law. As they are obliged to apply EU law in the respective Member States even where it may conflict with national law, they are considered to be the first "Union courts" (see e.g. *Simmenthal* or *Les Verts*). However, such a system cannot work if Member State courts are not independent.Second, the rationale behind Article 19(1)(2) TEU supports the Courts findings. Instead of further lowering the demanding *locus standi* criteria for individual actions before the CJEU (see Article 263(4) TFEU), the drafters of the Lisbon Treaty opted for a strengthened decentralised judicial system based on both the CJEU and Member State courts. The very function of Article 19(1)(2) TEU is to ensure that this diffused judicial system works and that no protection gaps arise. This necessarily enables the CJEU to specify and harmonise Member State provisions regarding judicial remedies and procedures (see e.g. *Unibet*, paras. 40-43 and *Factortame I*, paras. 19 et seq.). These two considerations seem to strongly indicate that *ASJP* is not the tectonic shift "reconfiguring the EU constitutional order".Instead, the CJEU could be seen as applying its well-known *effet utile* argument.

2. … or rather a recourse to "values"?

Yet there is another, potentially ground-breaking justification for the ample scope of Article 19(1)(2) TEU. Due to their open- and vagueness, it has been highly debated whether Article 2 TEU values create any legal obligations for the Member States or whether they unfold any justiciable legal effects. As such, it was not clear whether Article 2 TEU can be relied upon against developments in the Member States challenging the Union's very foundations. At the crucial passage of *ASJP*, the Court now states that

“Article 19 TEU […] gives *concrete expression* to the value of the rule of law stated in Article 2.”

In establishing this connection, the Court seems to render Article 2 TEU judicially applicable. It implicitly rejected an isolated, direct application of Article 2 TEU and opted for a “combined approach”. The CJEU uses a provision containing a specific obligation to “operationalise” the values enshrined in Article 2 TEU. They are judicially applied via a more specific provision translating them into specific legal obligations (for first articulations of this idea, see already here and here).

What is the effect of this approach? At first glance, it could lead to a limitation of Article 2 TEU to the *specific provision*’s scope. Accordingly, Article 2 TEU operationalised by Article 19(1)(2) TEU would be limited to the latter’s scope: “fields covered by Union law”. This limitation of Article 2 TEU’s effect by its specific carrier-provision, however, seems to severely neglect the overarching importance of Article 2 TEU and its unrestricted scope of application. The scope of Article 2 is not limited to the scope of application of the Treaties: The Member States are bound by it even in areas not covered by any (other) Union law.[5)]For a rare agreement, see European Commission, A new EU Framework to strengthen the Rule of Law, COM(2014) 158, 5; Council of the European Union, Opinion of the Legal Service, 10296/14, para. 17; see already European Convention, Praesidium: Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03, p. 11. To allow a provision of primary law to unilaterally prevail over Article 2 TEU would frustrate its overarching importance and probably not conform with the methods of systematic interpretation.

And indeed, the CJEU does not seem to limit the scope of Article 2 TEU operationalised by Article 19(1)(2) TEU to the “fields covered by Union law”. In *ASJP*, it established standards for *any* Member State court. How can this extended scope of Article 19(1)(2) TEU be explained? According to my reading, the interplay of Article 2 TEU with another more specific provision creates a “**mutual amplification**”: The specific provision of EU law (here Article 19 TEU) translates Article 2 TEU into a *specific* legal obligation. At the same time, the specific provision is “charged” with the general nature of Article 2 TEU. This “charging” effect also pertains to the specific provision’s scope. In this cumulating interplay, each contributes what the other lacks – specificity *and* unrestricted scope. As such, the combined provision of Article 2 TEU and its “carrier” creates legal obligations for the Member States even beyond the scope of (any other) Union law (see in detail, here).

In this sense, the logic of a “mutual amplification” kills two birds with one stone: It allows for the judicial applicability of Art. 2 TEU and its application beyond the scope of (any other) Union law. Eventually, such a mutual amplification could be operated with any other provision of EU law giving “concrete expression” to a value enshrined in Article 2 TEU and containing a specific obligation for the Member States. In order to not upset the federal equilibrium, however, such an approach needs to be accompanied by carefully construed limitations (for such limitations, see here).

III. Commission v. Poland: A stepping stone towards a strong “Union of values”?

As seen above, *ASJP* did not only establish a framework for addressing illiberal developments in the Member States threatening the Union’s common values (at least as far as judicial independence is concerned); it also leaves us with several uncertainties clouding the reach, justification and construction of these Union law responses.

Yet there is a pressing need to clarify the legal framework under which legal actions against “backsliding” Member States can take place – especially when the link to EU law is weak or difficult to establish. Further Commission procedures directed against Poland (see here and here) as well as Polish judges seeking the support of the Court depend on such clarity. Many Polish courts have submitted preliminary references to the CJEU concerning the retirement ages and the new disciplinary regime.[6)] On the Polish retirement ages for judges, see Zak#ad Ubezpiecze# Spo#ecznych (C-522/18); Unipart (C-668/18); on the new Polish disciplinary chamber and the influence of President of Republic/Minister of Justice on its composition, see Krajowa Rada S#downictwa (Indépendance de la chambre disciplinaire de la Cour suprême) (C-585/18), CP (Indépendance de la chambre disciplinaire de la Cour suprême) (C-624/18); DO (Indépendance de la chambre disciplinaire de la Cour suprême) (C-625/18); Krajowa Rada S#downictwa (C-537/18); Krajowa Rada S#downictwa (C-824/18); on the disciplinary measures against ordinary judges, see Miasto #owicz (C-558/18); Prokuratura Okr#gowa w P#ocku (C-563/18); Prokuratura Rejonowa w S#ubicach (C-623/18). Some of them are subject to disciplinary measures for the sole reason of launching a preliminary reference concerning the internal organisation of the Polish judiciary (see e.g. the accounts of Iustitia, Themis and the Helsinki Foundation). In light of these developments, a firm response of the Court establishing a solid legal framework for violations of Article 2 TEU seems therefore more urgent than ever.

ASJP was already a huge step in this direction. But as *András Jakab* noted so concisely: “a usual method for expanding judicial competences is to establish the competence but not to use it … The next step … is the establishment of a violation.” And this “next step” – this time a veritable stepping stone towards a strong “Union of values” – does not seem far away.

References

- 1. For such an interpretation, see e.g. K. Lenaerts, On Judicial Independence and the Quest for National, Supranational and Transnational Justice, in: G. Selvik et al. (eds.), The Art of Judicial Reasoning (Springer, 2019), 155, 163: “the scope of application of the second subparagraph Article 19(1) TEU is not the same as that of Article 47 of the Charter. The former applies to ‘the fields covered by EU law’, whilst the latter applies to national measures implementing EU law within the meaning of Article 51(1) of the Charter”; see further the opinion of Advocate General Tanchev: “a separate assessment of the material

scope of the second subparagraph of Article 19(1) TEU, and of Article 47 of the Charter is required". Instead of further clarifying this position, however, he completed his assessment at the procedural level: The Commission has the burden of proof to establish a violation of EU law (including its applicability in the first place) and failed to put forward any arguments concerning the Charter's application.

- 2. K. Lenaerts/J.A. Guttièrez-Fons, The Place of the Charter in the EU Constitutional Edifice, in: Steve Peers et al. (eds.), The EU Charter of Fundamental Rights: A Commentary (Hart, 2014), 1559, 1567.
- 3. This point has been advanced by M. Claes/M. Bonelli, Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary, European Constitutional Law Review 14 (2018), 622, 630-631.
- 4. Directives do not apply horizontally between two private individuals, see e.g. Bauer, paras. 76-77, Max-Planck-Gesellschaft, paras. 66-76.
- 5. For a rare agreement, see European Commission, A new EU Framework to strengthen the Rule of Law, COM(2014) 158, 5; Council of the European Union, Opinion of the Legal Service, 10296/14, para. 17; see already European Convention, Praesidium: Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03, p. 11.
- 6. On the Polish retirement ages for judges, see Zak#ad Ubezpiecze# Spo#ecznych (C-522/18); Unipart (C-668/18); on the new Polish disciplinary chamber and the influence of President of Republic/Minister of Justice on its composition, see Krajowa Rada S#downictwa (Indépendance de la chambre disciplinaire de la Cour suprême) (C-585/18), CP (Indépendance de la chambre disciplinaire de la Cour suprême) (C-624/18); DO (Indépendance de la chambre disciplinaire de la Cour suprême) (C-625/18); Krajowa Rada S#downictwa (C-537/18); Krajowa Rada S#downictwa (C-824/18); on the disciplinary measures against ordinary judges, see Miasto #owicz (C-558/18); Prokuratura Okr#gowa w P#ocku (C-563/18); Prokuratura Rejonowa w S#ubicach (C-623/18).
